No. 129 Orginal

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Plaintiff,

v.

STATE OF MARYLAND,
Defendant.

REPLY BRIEF OF THE AUDUBON NATURALIST SOCIETY SEEKING REVIEW OF THE SPECIAL MASTER'S FINDING OF SUBJECT MATTER JURISDICTION

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SOP

There Is No Procedural Obstacle That Prevents This Court From Considering Its Own Jurisdiction

The Commonwealth of Virginia has not attempted to demonstrate why it has standing to assert the claims raised in its Bill of Complaint or to explain why those claims are ripe, but instead asks that this Court ignore these jurisdictional questions for procedural reasons. While the Commonwealth's interest in shielding the jurisdictional questions from scrutiny is understandable, there is no procedural obstacle that prevents this Court from doing so.

Subject matter jurisdiction is not a question that must be raised by the parties. This Court has explained that it is "required to address" its subject matter jurisdiction, "even if the parties fail to raise the issue." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). In the past, the Court has considered jurisdictional challenges raised by non-parties, explaining that "it would be required, of course, to raise these matters on our own initiative." *ASARCO, Inc. v. Kadish*, 409 U.S. 605, 611 (1989). The Court never has recognized any procedural rule that restricts its ability to consider its jurisdiction, but instead has considered its jurisdiction once it appears that an issue as to jurisdiction exists. Here, of course, the jurisdictional issue now has been raised by the State of Maryland, as well as by the Audubon Naturalist Society ("ANS"). (*See* Md. Br. at 1 ("Maryland agrees with Audubon that no case or controversy exists supporting this Court's jurisdiction over this case.")

In original actions, where no record has been developed by a trial court, the Court typically decides jurisdictional issues after they have been referred to a Special Master. While this Court, at times, has addressed jurisdictional questions in deciding whether to grant or deny leave to file a Bill of Complaint, its "normal practice" has been to appoint a Special Master to examine the jurisdictional issues and the

merits of a case in the first instance. *Wyoming v. Oklahoma*, 502 U.S. 437, 463 (1992) (Scalia, J., dissenting).

In the opinion of the Audubon Naturalist Society ("ANS") and the State of Maryland, it is necessary for the Court to now consider the jurisdictional question for itself. This Court granted ANS' motion to participate as an *amicus curiae* to challenge this Court's subject matter jurisdiction at the same time that it granted the Commonwealth's motion for leave to file a Bill of Complaint. *Virginia v. Maryland*, 120 S.Ct 2192 (2000). The Court appeared to have followed its "normal practice" of referring the questions as to jurisdiction and the merits of the dispute to Special Master Lancaster on October 10, 2000. *Virginia v. Maryland*, 121 S.Ct. 294 (2000). It appears that the Special Master misunderstood this Court's order granting leave to file a Bill of Complaint as having "implicitly" decided that jurisdiction exists, rather than as simply referring all of the questions in the case for the Special Master to decide in the first instance. Special Master's Memorandum of Decision No. 1, *Virginia v. Maryland*, No. 129 (U.S. Dec. 11, 2000).

As demonstrated in the briefs of both ANS and the State of Maryland, the time for this Court to review the question of subject matter jurisdiction is now. Ordinarily, the resolution of such a dispositive issue by the Special Master is made through a recommendation to the Court through a Report, but in this instance the Special Master chose to issue an order, apparently assuming that the issue already had been resolved by the Court. Had the Special Master filed his decision on jurisdiction as a Report, both the parties and prospective *amici* would have had the right to suggest exceptions to the Special Master's Report. *See, e.g.*, S.Ct. Rule 33(1)(g)(x) (noting that *amici* can file exceptions to a Special Master's Report). The Court, therefore, should treat the Special Master's Order as a Report and decide whether his decision regarding jurisdiction was appropriate. While the Court

would be well within its power to conclude for itself that no jurisdiction exists, it also could provide guidance to the Special Master for how these jurisdictional questions should be considered and remand the issues to him.

This request for the Court to follow its ordinary practice of insisting that its Special Master, like lower federal courts, consider jurisdictional issues before involving the parties in lengthy proceedings concerning the merits is entirely reasonable. Nevertheless, without ever having answered ANS' objections to its lack of standing and the lack of ripeness of its claims, the Commonwealth asserts that it is somehow "frivolous" for ANS to advise the Court that the Special Master essentially foreclosed any jurisdictional challenge without informing the Court. (Va. Br. at 21.)[1] The Commonwealth's decision to seek costs against a public interest organization for aiding the Court in identifying jurisdictional issues that Maryland also has raised and that Virginia simply would rather not address is inappropriate.

ANS has involved itself in this litigation because it believes that the legal arguments advanced by the Commonwealth are wrong as a matter of law and would lead to disastrous results for the environment, its members and others who enjoy the Potomac River. The Court and the law benefit from the effort of third parties, like ANS, that attempt to help the Court reach the correct decisions on the merits of the legal issues that come before it. Likewise, the Court and

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[1] The Commonwealth's suggestion that *Nebraska v. Wyoming*, 504 U.S. 982 (1992), somehow supports its claims for sanctions is without merit. (Va. Br. at 21-22.) That decision merely upheld a decision by a Special Master to allocate a portion of *his* costs to an *amicus curiae* (with the consent of the *amicus curiae*), as well as the parties, because the *amicus* was allowed to participate in hearings in a similar manner to the parties. We are not aware of any instance where this Court has ordered an *amicus curiae* or third party to pay the legal expenses of a party.

the law benefit when third parties help the Court to recognize that there is no reason to reach the merits of any decision when it lacks jurisdiction in a case, as ANS has shown to be the case here.

CONCLUSION

For the reasons set forth above, ANS requests that this Court clarify its prior order, overrule the Special Master's finding of jurisdiction, direct the Special Master to consider whether the Commonwealth of Virginia has established subject matter jurisdiction before addressing the merits of the parties' claims and reject the Commonwealth's motion for costs.

Respectfully submitted,

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